

Bad Faith?
**A prominent academic, rabbi, and government appointee
claims that same-sex marriage is unjust**

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In Defense of Religious Liberty
David Novak
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A conversational response to an ethical or political conflict sounds like something relaxed and congenial. In fact, few things are more challenging. Because interlocutors must be willing truly to listen to each other, and this means being open to making sometimes radical transformations to their positions. It goes almost without saying that the challenge is especially acute in a multicultural democracy such as Canada.

One would think that David Novak is aware of this. Novak is an academic philosopher and a Conservative rabbi. He's also one of the Harper government's appointees to the board of Assisted Human Reproduction Canada, a body that oversees the use of new reproductive technologies – making his perspective on societal norms particularly worthy of attention. This is why it is so disconcerting that, while Novak begins his latest book, *In Defense of Religious Liberty*, by telling us that it is about religious liberty in the sense of “the freedom of a religious community to bring its own moral wisdom into the world,” we soon learn that he views the role of the religious community in rather more forceful terms. To Novak, the political exercise of religious liberty “is the claim religious people make on society as a whole to adhere to certain moral norms they regard to be universally binding on all people” and this “religious freedom [is] the first right in a secular society, one that trumps all other rights.”

Universally binding norms, trumping rights, etc. – these are not the kinds of things one wants to hear if one is interested in genuine dialogue. Novak claims to favour discussion – his book's final sentence declares that democracy needs “conversation” to “justify its own life and future” – but he also hints that we should be questioning his good faith: “If Canada ever threatens my religious freedom, or abandons its traditional commitment to what I consider to be universal standards of justice, then I would have to ask myself whether I could continue to be a citizen of Canada in good faith.” And it seems likely that Novak must now be asking himself precisely this question, since his book argues that one clear “assault” on his religious liberty would be the legalization of same-sex marriage, which is what Canada did in 2005.

It is, however, possible that Novak is unaware of the *Civil Marriages Act*. There is certainly no mention of it in his book. Yet perhaps this should not be so surprising because, although he has been the J. Richard and Dorothy Shiff Professor of Jewish Studies at the University of Toronto since 1997, having come to this country from the United States, he does not seem to know very much about Canada. How else to explain his claim that there is no indication that a majority of

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citizens in either country has wanted to change the definition of marriage when this has not been true of Canadians since 2004? Maybe he thinks this because, in an aside that cannot but vex the Canadian reader, he assumes that “the great issues of public morality dealt with in this book are almost always identical in both countries.” This in turn might account for his belief that, in both, all legislation is subject to judicial review, something he would know is not true of Canada if he had ever read our Charter of Rights and Freedoms (or “Charter of Rights and Responsibilities,” as he calls it). Still, I cannot fathom how he came to his supposition that Quebec politicians, fearing the moral force of the Catholic church in the province, will one day inflict officiation of same-sex marriage on its priests in order “to cripple it.” Because as anyone who has set foot here since the Quiet Revolution should know, while our politicians are said to fear many things (separatism, money and the ethnic vote, etc.), the moral force of the Catholic church is not one of them.

The issue of same-sex marriage plays a central role in this book – to the virtual exclusion, in fact, of all other issues that give rise to secular versus religious tensions, such as abortion, euthanasia, free speech, stem cell research, evolutionary theory or women’s rights. But discussing a single practical case allows Novak to develop his mainly theoretical and theological ideas, illustrating in the process how he believes such tensions should be settled more generally.

That Novak takes a rather hard line is evident from his reaction to those who suggest that a state could legalize same-sex marriage without imposing upon religious communities that reject it, either by exempting their clergy from marrying homosexuals or by getting out of the marriage business altogether, abolishing civil status for any and all married couples. To Novak, both of these moves would still constitute assaults on the liberty of religious communities that reject same-sex marriage – the former because it amounts to a form of “degrading” toleration, and the latter because, given that civil marriage supports religious marriage, it would mean the state was failing in its duty to support a religious community’s “positive liberty” to live in a way consistent with its beliefs.

So how does Novak defend religious liberty from these “assaults”? Certainly not by going to the trouble of trying to convince those of us who support same-sex marriage that we are mistaken. That is, while he does take the time to point out that homosexuality is “bad for human persons,” he says nothing to back such statements up. Moreover, while he may be right that (all other things being equal) children are best raised by their married biological parents, simply asserting without a single citation that this is true “by every sociological indication,” or challenging “if you don’t believe me on this point, please consult some children,” does not do very much. After all, what if the kids understandably reply that they’d prefer two married gay parents over a single straight one?

Novak is not bothered by such questions because, instead of conversing with his fellow citizens, he’s more interested in fighting “the battle for religious liberty” – hence his focus on crafting a theoretical argument that rules out same sex-marriage as an illegitimate violation of that liberty. The argument has its shortcomings, however. It begins with the dubious (for a Canadian) premise that all men are endowed by their Creator with certain unalienable rights including life, liberty and the pursuit of happiness. Novak then claims that we must see exercising these rights as commandments from God; otherwise, our motivations can be confused with the same sort of

blind impulses that led the Nazis to torture and kill. That's quite a leap, but Novak wants us to jump still further, since he then suggests that a slight change to the wording of the Declaration of Independence is required: "life, liberty, and the pursuit of happiness" should be replaced by "the pursuit of life, liberty, and happiness," since this supposedly helps us to see how the pursuit of life must take its first form as – you guessed it – the pursuit of family through marriage. As for the pursuit of happiness, a short discussion leads Novak to conclude that it can be rightfully exercised only in order to fulfill "the highest good," which, of course, "is inevitably pursued in the way most people have always sought God."

Now it is telling that I, something of a religious thinker myself, am not merely unconvinced by this argument; I am bewildered. But perhaps that's just my problem. What makes it everyone's problem is what Novak believes it does, namely, that it establishes the various rights he associates with religious liberty as pre-political, as existing prior to the authority of the state, and so as unalienable. This is what permits him to claim that they are above political dialogue and so should be enforced by the state forthwith.

Such is the thinking of a natural law theorist, someone for whom there exist certain moral principles that are set by nature and so are valid, and therefore unquestionable, everywhere. The problem with this is not that we ought never to refer to a global ethic. We just need to recognize it as something quite minimal, as limited to such things as the prohibitions on murder, torture and other forms of gross cruelty – and even these few should never be placed beyond the reach of dialogue, since otherwise we naively limit the range of legitimate moral conflict.

The main problem with asserting anything other than a minimal global ethic, however, is that it will cause us to fail to live up to the challenge of diversity, making us parochial in the face of the great range of conceptions of the good that people have held throughout the history of the world. Even the foreignness of our own Western ancestry gets distorted. The ancient Greeks, for example, never distinguished between the ethical and the political, or the social and the political, as we do today. This point in particular helps convey the limits of Novak's natural law approach, since he confidently cites Aristotle as providing support for the notion of pre-political religious rights. But this is a misappropriation: to Aristotle, such claims would make no sense, since man is a political animal from the start.

What about those of us who hope to discuss, instead of battle over, the issue of same-sex marriage? I think Novak is right, if somewhat hypocritical, to complain that many of its proponents have not been very good conversation partners, what with their rushing off to the courts or labelling their opponents as homophobic. What's required instead is a willingness to speak and listen in ways conducive to reaching a shared understanding. One should not thrust one's alien views and premises on an interlocutor; rather, it is necessary to accept, even if only for argument's sake, what he or she takes as an authority, and then argue from there to one's preferred position by offering a reinterpretation of that authority's implications.

Accordingly, I'd like to begin making my own contribution to such a conversation by referring to the obvious passage in the Hebrew Bible, Leviticus 20:13. A key piece of scripture often cited in objections to same-sex marriage, the lines go as follows: "If a man lies with a male as one lies with a woman, the two of them have done an abhorrent thing; they shall be put to death – their

bloodguilt is upon them.” For some reason, this tends to be interpreted as forbidding homosexual sex in general. Yet Leviticus (indeed the whole Bible) has absolutely nothing to say against lesbianism – and this even though it manages to refer not only to how a woman who has sex with an animal should be punished (20:16), but also to the kinds of fabrics one should not wear (19:19), or to what a man with a flat nose should not do (21:18), and so on.

So if Leviticus 20:13 is not concerned with homosexuality per se, what is it concerned with? If I claimed that little boys should not play schoolyard games with one another in the same way they ought to play with little girls, it might reasonably be interpreted as expressing the old-fashioned view that while boys should check their impulse to roughhouse when playing with girls, they should go ahead and play rough with each other. Similarly, I want to suggest that 20:13 refers strictly to *the way* men who have sex with each other should do so; namely, that it should differ from how they have sex with women (“*as one lies with a woman*”). And what might that consist in? A number of scholars have explored the various possibilities here in great detail: Saul Olyan, for instance, argues from textual evidence that the verse is very specifically a prohibition on anal intercourse between men. Or we might extrapolate from Kenneth Dover’s study of ancient Greek homosexuality and argue that the verse objects only to men engaging with each other in the “inegalitarian” sexual positions that, in those highly sexist times, were associated with heterosexual sex. Such readings of 20:13 clearly leave a wide variety of homoerotic practices as permissible, not to mention same-sex marriage, even for strict adherents to scripture.

It is also significant that a given culture can be so concerned about such a thing as to prescribe the death penalty. This says something about its strangeness vis-à-vis our own culture, and that lends support to the point above about the diversity of cultures in the world, which Novak’s natural law approach fails to recognize sufficiently. Indeed, today, all of Leviticus’ rules invoking the death penalty have been abrogated, or at least radically refashioned, by the various branches of Judaism, and it goes without saying that the rules about animal sacrifices, the proper practice of slavery, and many others, no longer carry much practical interest.

So it is no surprise that Novak opts to support his vision of a “civilly decent society” by focusing instead on the laws described in Genesis 9:1–17 as given by God to Noah for all humankind, which are supposed to be still wholly in force – even though (for some unexplained reason) Novak seems willing to make exceptions when it comes to its bans on idolatry (non-Jews may practice it) and homosexuality (homosexuals may have sex as long as they do so discreetly, i.e., they’re not to ask society to affirm their way of life politically). Yet is this last exception even necessary? Novak tells us that the fourth Noahide commandment forbids “incest, adultery, homosexuality, and bestiality” but this translation is not quite correct. Because the relevant passages he cites from the *Tosefta*, a supplement to the compilation of Jewish Oral Law known as the *Mishnah*, refer only to fornication, explaining that the term is meant to apply to any form of prohibited sexual act that’s worthy of receiving the death penalty. And for our purposes, this only begs the question.

It seems, then, that Novak’s account of the Noahide covenant must be added to the many other claims in his book that remain, at least to this reader, a mystery. Most mysterious of all, however, is how he can possibly believe that his non-conversational approach could help religious communities bring their moral wisdom into the world.